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In the Supreme Court of the United States

OCTOBER TERM, 1980

FEDERAL ELECTION COMMISSION, APPELLANT

v.

AMERICANS FOR CHANGE, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

CHARLES N. STEELE *
General Counsel

KATHLEEN IMIG PERKINS
Assistant General Counsel

JEFFREY H. BOWMAN
MIRIAM AGUIAR
SONDRA L. MILLS
Attorneys

Research Assistance
STEPHEN H. MIMS

Attorneys for
FEDERAL ELECTION COMMISSION
1325 K Street, N.W.
Washington, D.C. 20463
(202) 523-4143

* Counsel of Record

MAY 9, 1981

QUESTION PRESENTED

Whether a provision of the Presidential Election Campaign Fund Act which limits the amount of money that political committees may spend to further the election of publicly financed presidential candidates is consistent with the first amendment to the Constitution of the United States, where Congress has determined that such a limit promotes compelling governmental interests and is necessary to preserve public funding as an alternative means of financing presidential election campaigns.*

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* Other parties to the proceeding are Americans for an Effective Presidency and Fund for a Conservative Majority. Consolidated with No. 80-849, *Common Cause, et al.* v. *Harrison Schmitt, et al.*, (three-judge court); additional parties are Carl T. Curtis, Winifred Long and David Cohen.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1607

FEDERAL ELECTION COMMISSION, APPELLANT

v.

AMERICANS FOR CHANGE, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

OPINION BELOW

The opinion of the district court is not yet officially reported, but appears at Appendix A of the Federal Election Commission's Jurisdictional Statement at 1a ("FEC J.S. App. at ——.")

JURISDICTION

Jurisdiction is conferred by 26 U.S.C. § 9011(b) and 28 U.S.C. §§ 1252 and 2101(b).

A three-judge district court was convened pursuant to 26 U.S.C. § 9011(b) to "implement or construe" 26 U.S.C. § 9012(f). On August 28, 1980, the three-judge court entered two expedited orders granting, *inter alia*, appellees' motions for summary judgment. *See* Joint Appendix at 17 ("J.A. at ——), FEC J.S. App. at App. B, 35a. On September 30, 1980, the court issued an

opinion holding 26 U.S.C. § 9012(f) unconstitutional and entered a further order disposing of the case consistent with its earlier orders. J.A. at 17, FEC J.S. App. at App. A, 1a. Appellant's Jurisdictional Statement was filed timely on December 29, 1980, and this Court noted probable jurisdiction, consolidating this case with No. 80-847, on February 23, 1981. J.A. at 18.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The first amendment to the Constitution of the United States provides in pertinent part:

> Congress shall make no law . . . abriding the freedom of speech, or of the press; or the right of the people to assemble. . . .

26 U.S.C. § 9012(f) provides in relevant part:[1]

> . . . [I]t shall be unlawful for any political committee which is not an authorized committee with respect to the eligible candidates of a political party for President and Vice President in a presidential election knowingly and willfully to incur expenditures to further the election of such candidates, which would constitute qualified campaign expenses if incurred by an authorized committee of such candidates, in an aggregate amount exceeding $1,000.

STATEMENT OF THE CASE

This case seeks review by this Court of a decision of the United States District Court for the District of Columbia (three-judge court). That decision resulted after the Federal Election Commission ("the Commission" or "FEC")[2] filed a complaint on July 15, 1980,

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[1] On December 29, 1980, the Federal Election Commission lodged 10 copies of "Federal Election Campaign Laws" with the Court. The Presidential Election Campaign Fund Act ("the Fund Act") is set forth in its entirety therein, and the full text of 26 U.S.C. § 9012(f) appears therein at 74.

[2] Appellant FEC is the independent agency of the United States government vested with the authority to litigate questions involving the construction, implementation and validity of the Presidential

pursuant to 26 U.S.C. §§ 9010(c) and 9011(b)[3] seeking to implement and construe 26 U.S.C. § 9012(f) as applicable to appellant committees. *See* J.A. at 17, FEC J.S. App. at 43a.

On August 28, 1980, the three-judge district court issued an expedited order denying the Commission's motion for summary judgment and granting summary judgment for the defendants.[4] The court also denied a motion

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Election Campaign Fund Act, 26 U.S.C. §§ 9001-9013, as well as the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 431-455, "FECA" and the Presidential Primary Matching Payment Account Act, 26 U.S.C. §§ 9031-9042. The Commission is also vested with exclusive jurisdiction with respect to civil enforcement of these laws. *See* 2 U.S.C. §§ 437c(b)(1), 437d(a)(6), 437d(e); 26 U.S.C. §§ 9005(a), 9007(a) and (b), 9010(c), 9011(b), 9036(a) and (b), 9040(b), (c) and (d).

[3] Section 9010(c) authorizes the Commission to seek declaratory and injunctive relief from federal courts with regard to civil matters covered by the Fund Act. And § 9011(b) states that the Commission may institute actions in federal courts to implement or construe the Fund Act. All such actions are "heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28, United States Code, and any appeal shall lie to the Supreme Court." 26 U.S.C. §§ 9010(c), 9011(b). These jurisdictional provisions also require "the judges designated to hear the case to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited." *Id.*

[4] The Commission's suit named as defendants three political committees: (1) Americans for Change ("AFC"), an unincorporated association and a political committee within the definition of 2 U.S.C. § 431(4) and 26 U.S.C. § 9002(9). AFC registered with the Commission as a political committee by filing its Statement of Organization on June 3, 1980, and has since qualified as a multi-candidate political committee under FECA. (2) Fund for a Conservative Majority ("FCM"), a multi-candidate political committee, registered with the Commission. FCM originally registered in 1972 with the General Accounting Office as "Young Americans Campaign Committee." On October 13, 1976, FCM filed an amendment changing its name to Fund for a Conservative Majority. "Citizens for Reagan in 1980" is a "project" of FCM which is not separately registered with the Commission. (3) Americans for an Effective Pres-

filed by Common Cause to intervene in the Commission's suit, granted a motion filed by the American Civil Liberties Union Fund of the National Capital Area to participate as *amicus curiae*, and denied all other pending motions. *See* J.A. at 17, FEC J.S. App. B at 35a. That same day, August 28, 1980, the court issued an order in *Common Cause, et al.* v. *Schmitt, et al.* denying Common Cause's motion that its case be consolidated with the Commission's action; dismissing that part of the *Common Cause* complaint which asked that the court declare a violation of the Fund Act for lack of subject matter jurisdiction and failure to state a claim; dismissing that part of the *Common Cause* complaint which sought enforcement of 26 U.S.C. § 9012(f) "on the basis of the Court's decision in C.A. No. 80-1755, *Federal Election Commission* v. *Americans for Change, et al.*;" denying defendants' motions for protective orders as moot; and denying all other pending motions. *See* J.A. at 17, Common Cause's Jurisdictional Statement Appendix at 33a ("C.C. J.S. App. at ——").

Thereafter, on September 24, 1980, the court, *sua sponte*, ordered that the Commission's action be consolidated with *Common Cause* v. *Schmitt*. *See* J.A. at 17, FEC J.S. App. C at 37a. And, on September 30, 1980, the court rendered its judgment and opinion in *FEC* v. *Americans for Change*, declaring 26 U.S.C. § 9012(f) unconstitutional, the judgment herein appealed from. *See* J.A. at 17, FEC J.S. App. A at 1a.

The court concluded that this Court's analysis in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), "control[led] the election law case before this court," and that 26 U.S.C. § 9012(f) does not serve a sufficiently compelling governmental interest to outweigh what the court deemed its heavy burden on speech. *See* J.A. at 17, FEC J.S. App. A at

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idency ("AEP"), an unincorporated association which is a political committee as defined by 2 U.S.C. § 431(4) and 26 U.S.C. § 9002(9). AEP registered with the Commission as a political committee by filing its Statement of Organization on July 8, 1980, and has since qualified as a multi-candidate political committee.

9a, 21a. The court thus rejected Congress's conclusion that § 9012(f) is central to the objectives of making public financing of presidential elections a substitute for private financing and of furthering public participation in the political process. The court's judgment also necessarily ignores the congressional determination that the statute overall carefully balances individual rights and maximizes individual participation in the presidential election process while limiting the impactof large aggregations of wealth spent to further the election of publicly financed presidential candidates. *See* J.A. at 17, FEC J.S. App. A at 27a.

SUMMARY OF ARGUMENT

Congress has concluded, after more than seventy years of discussion, debate, and investigation, that the integrity of the presidential election process and confidence in the federal government—indeed in our very system of government—would be enhanced by funding presidential general election campaigns through individual tax dollars. The public funding system established by Congress, enacted in 1971 as the Presidential Election Campaign Fund Act, Pub. L. No. 92-178, 85 Stat. 573 (1971), allows individual taxpayers to participate voluntarily by way of a $1 tax return check-off to fund presidential election campaigns. Since the beginning of the fund in 1973, citizens have designated nearly 250 million of their income tax dollars to be used to provide campaign funds for presidential candidates. This high level of citizen participation has enabled every major party candidate since 1974 to free himself from the "rigors of fundraising" by opting for a publicly funded campaign.

Legislative history of the Fund Act and its predecessors is replete with discussion and debate over the purposes of public financing, the safeguards necessary to protect the proper use of public monies for public financing and the impact of such a program on individual first amendment freedoms. Congress clearly debated all sides

of this issue and concluded, as this Court has affirmed, that public financing of presidential election campaigns is a program which serves to enhance rather than restrict first amendment freedoms. *Buckley* v. *Valeo*, 424 U.S. 1, 92-3 (1976). Included in Congress's program is 26 U.S.C. § 9012(f) a carefully drawn statutory provision which limits, as narrowly as possible while still attaining congressional objectives, the expenditure of private funds by political committees in support of publicly financed presidential candidates. Congress debated the necessity and the constitutionality of such a limitation and concluded that a limitation of $1,000 was required to protect the goals of public financing. As this Court has held with regard to another limitation of the Fund Act:

> Without any doubt a range of formulations would sufficiently protect the public fisc and not foster factionalism, and would also recognize the public interest in the fluidity of our political affairs. We cannot say that Congress' choice falls without the permissible range.

Buckley v. *Valeo*, 424 U.S. at 103-104.

The district court's judgment that § 9012(f) is unnecessary to public financing and inconsistent with the first amendment fails to recognize the important governmental purposes advanced by Congress in support of the provision. Moreover, the judgment conflicts with other decisions of this Court holding the Fund Act constitutional, *Buckley* v. *Valeo*, *supra*, and *Republican National Committee* v. *Federal Election Commission*, 487 F. Supp. 280 (S.D.N.Y. 1980) (three-judge court), 616 F.2d 1 (2nd Cir. 1980) (en banc) (per curiam), *aff'd mem.*, 445 U.S. 955 (1980), and with other decisions delineating the scope of the first amendment and the importance of our two-party system of government. *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978); *Storer* v. *Brown*, 415 U.S. 724, 736 (1974). Section 9012(f), contrary to operating as an unconstitutional limitation

on individual first amendment freedoms, actually promotes individual participation in the presidential election process. This Court should reverse the judgment of the district court, find that § 9012(f) is consistent with the first amendment based upon application of previous decisions of the Court, and afford deference to the judgment of Congress in this regard.

ARGUMENT

I. THIS COURT SHOULD AFFIRM CONGRESS'S JUDGMENT THAT A LIMITATION ON INDEPENDENT EXPENDITURES BY UNAUTHORIZED POLITICAL COMMITTEES IS NECESSARY TO THE PUBLIC FINANCING OF PRESIDENTIAL ELECTIONS.

This case involves the validity of a provision of the Presidential Election Campaign Fund Act ("the Fund Act") and poses substantial questions concerning the authority of Congress to enact legislation protecting the integrity of the electoral process. The authority of Congress to regulate federal elections, including presidential election campaigns is clear. *Ex parte Yarbrough*, 110 U.S. 651, 657-8 (1884); *Buckley* v. *Valeo*, 424 U.S. 1, 13 (1976) (*"Buckley"*). This Court has held that:

> "as a practical matter there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." . . .

Marchioro v. *Chaney*, 442 U.S. 191, 196 (1979), *quoting Storer* v. *Brown*, *supra* at 730. *See Burroughs* v. *United States*, 290 U.S. 534, 545 (1934); United States Constitution, art. 1, § 4. It was pursuant to this grant of authority, together with the broad power granted under the general welfare clause[5] that Congress, in 1971, enacted the Fund Act.

The Fund Act is the product of more than seventy years of extensive congressional debate and hearings aimed at bringing meaningful reform to the area of

financing presidential election campaigns.[6] Enacted as part of the Revenue Act of 1971, Pub. L. No. 92-178, 85 Stat. 573 (1971), the Fund Act established the present fund within the Department of the Treasury and inaugurated the voluntary taxpayer check-off system as "an alternative way of financing the general election campaign funds of presidential or vice-presidential candidates" S. Rep. No. 92-553, 92d Cong., 1st Sess. 56 (1971); 117 Cong. Rec. 41,762 (1971) (remarks of Sen. Pastore). Under the public financing scheme major party candidates who satisfy the eligibility requirements outlined in 26 U.S.C. § 9003 are entitled to equal payments from the fund to defray all of their "qualified campaign expenses", *i.e.*, expenses incurred by a presidential candidate and running mate, or any of their authorized committees, to further their election. 26 U.S.C. § 9002(11). Once a candidate has chosen a publicly financed campaign, he or she may accept private contributions only if they are necessary to make up for any deficiency in the fund. 26 U.S.C. §§ 9003(b)(2), 9012(b). In no event, however, may a publicly funded candidate spend more than his or her allotment under 26 U.S.C. § 9006. *See also* 26 U.S.C. § 9012(a).

Congress designed the Fund Act to eliminate the appearance and possibility of political *quid pro quos* preva-

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[5] The general welfare clause, United States Constitution, art. 1, § 8, cl. 1 is "a grant of power, the scope of which is quite expansive, particularly in view of the enlargement of power by the necessary and proper clause." *Buckley*, 424 U.S. at 90 *citing McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 420 (1819). *See United States* v. *Classic*, 313 U.S. 299 (1941); *Helvering* v. *Davis*, 301 U.S. 640, 641 (1937); *United States* v. *Butler*, 297 U.S. 1, 16 (1936). *See also* Hamilton, The Federalist Papers Nos. 30 and 34; *cf.* Madison, The Federalist Papers No. 41. This Court has concluded that "public financing as a means to reform the electoral process [is] clearly within the granted power." *Buckley*, 424 U.S. at 90.

[6] *See* 117 Cong. Rec. 41,745-48 (1971) for a synopsis of proposed legislation aimed at reforming the electoral process by freeing candidates from over-dependence upon special interest groups.

lent in privately financed presidential campaigns and to foster individual participation and public discussion in the electoral process.[7] *See* S. Rep. No. 93-689, 93d Cong., 2d Sess. 9-10 (1974). Public financing would free the candidate from the rigors of fundraising;[8] promote public discussion of issues; restore public confidence in government; "make a major change that would be a tremendous improvement toward lifting the office of the Presidency above the power of private money to control it,"[9] 117 Cong. Rec. 41,947 (1971) (remarks of Sen. Long); "take the whole presidential electoral process out of the arena of big astronomical money," 117 Cong.

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[7] The growing influence of money in presidential elections with the concomitant possibility that large sums of money would buy an interest in government had concerned Congress since 1907. By 1971, congressional committees had held no less than 23 sets of hearings on election reform. Indeed, as early as 1937, a Special Senate Committee to Investigate Campaign Expenditures of Presidential, Vice-Presidential and Senatorial Candidates published a report based on extensive investigation of all facts relating to campaign expenditures, contributions and other means of influence in federal elections. The Committee recommended, *inter alia*, that, to curb the deleterious influence of money, "private contributions to political campaigns be prohibited entirely and that instead *all elections expenses be defrayed from public funds.*" S. Rep. No. 151, 75th Cong., 1st Sess. 17 (1937) (emphasis added). *See* 113 Cong. Rec. 8297 (1967) (remarks of Sen. Morton); *Hearings on S.3496 Before the Senate Committee on Finance*, 89th Cong., 2d Sess. 13 (1966). *See also 1956 General Election Campaign Report of the Subcommittee on Privileges and Elections, Together with Minority Views, Submitted to the Subcommittee on Rules and Administration*, 85th Cong., 1st Sess. 3 (1957). The committee expressed concern over heavy campaign expenditures which would "grow worse" without remedial action by Congress.

[8] In the words of Senator Humphrey, no presidential candidate "should have to go around with hat in hand or be held in suspicion." 117 Cong. Rec. 41,965 (1971) (remarks of Sen. Humphrey).

[9] This Court has recognized that "[e]ssential to the survival and to the growth of our national government is its power to fill its elective offices and to insure that the officials who fill those offices are as responsive as possible to the will of the people whom they represent." *Oregon* v. *Mitchell*, 400 U.S. 112, 134 (1970).

Rec. 42,377 (1971) (remarks of Sen. Pastore); and thus "end the most flagrant single abuse in our democracy, the unconscionable power of money." 117 Cong. Rec. 41,778 (1971) (remarks of Sen. Kennedy).

In devising this comprehensive scheme Congress concluded that the Fund Act would not achieve its stated legislative objectives without some limitation on the expenditure of private funds. During the extensive debate on the Fund Act, Congress sought to assure that the receipt of federal funds would be a substitute to private funds, not a mere supplement to those funds, recognizing the delicate balance to be struck between attaining the stated goals of public financing and protecting individual first amendment freedoms. Congress determined that it had achieved this balance by enacting § 9012(f)—a narrow provision which limits only expenditures in excess of $1,000 by political committees, other than those authorized by the candidate, where such expenditures are made to further a publicly funded candidate's election and would, if incurred by the candidate's authorized committee,[10] constitute qualified campaign expenses. Indeed, it is § 9012(f) which assures that federal funds received by presidential candidates are not a mere supplement to private financing,[11] thus preventing circumvention of congressional objectives.

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[10] The term "authorized committee" is defined to mean any political committee which is authorized in writing by the candidate to incur expenses to further his or her election. 26 U.S.C. § 9002(1).

[11] *See, e.g.*, S. Rep. No. 92-553, 92d Cong., 1st Sess. 56 (1971); 117 Cong. Rec. 41,762 (1971) (remarks of Sen. Pastore). Absent § 9012(f), presidential election campaigns will not be totally funded from tax dollars. During the 1980 presidential general election campaign, while both major party candidates received $29.4 million in federal funds, five non-party political committees alone spent approximately $8 million in independent expenditures for President Reagan. It is during this period that the Congressional Club spent 90% of its $3,358,796 in independent expenditures, the National Conservative Political Action Committee ("NCPAC") spent 92% of its $2,102,301, FCM spent 55% of its $1,772,535, AEP spent 100% of its $1,270,208, and AFC spent 100% of its $711,856. *See* Data

Rather than completely prohibiting private spending by unauthorized groups, drafters of the original legislation, sensitive to constitutional concerns and interested in promoting direct individual expression, concluded that unauthorized committees would be permitted to spend up to $1,000 for publicly financed candidates. 117 Cong. Rec. 41,778 (1971) (remarks of Sen. Kennedy). Publicly financed presidential candidates would be allowed to defray qualified campaign expenditures only with public funds; individuals would remain free to make unlimited independent expenditures for the presidential candidate of their choice.[12] While sponsors of the legislation sought to prevent public funding from being a mere supplement to increased private spending, Congress at the same time "did not want to begin to straightjacket organizations that have a legal right . . . to express their personal opinion." 117 Cong. Rec. 42,399 (1971) (remarks of Sen. Pastore). Faced with these considerations, Congress determined to permit these groups to "operate up to $1,000," 117 Cong. Rec. 41,778 (1971) (remarks of Sen. Kennedy), a legislative determination entitled to deference by this Court.[13]

Congress had an abundant historical base from which to conclude, and the foresight to recognize, that political committee leaders raising large numbers of contributions

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Compiled from the Public Records of the Federal Election Commission ("*Data*") at 148, 184, 222, 224, 230. Twenty copies of the *Data* were lodged with this Court on April 28, 1981. This document was compiled from public disclosure records filed by political committees with the FEC.

[12] On individual first amendment freedoms, Senator Long observed: "You cannot prohibit a citizen from campaigning for the candidate of his choice. His constitutional right of free speech clearly permits him to go around the country speaking, shouting, carrying signs advocating the candidate he supports. . . ." 113 Cong. Rec. 8309 (1967) (remarks of Sen. Long).

[13] Appraising Congress's analysis, it is instructive to recall Justice Holmes' observation in *Missouri, Kansas & Texas Ry. Co.* v. *May*, 194 U.S. 267, 270 (1904), "It must be remembered that legislators are the ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."

and using this aggregated wealth to defray what would otherwise be qualified campaign expenses on behalf of presidential candidates presented a potential danger to the electoral process. The power and influence that these groups could exert or appear to exert over the particular candidate was a consequence to be avoided.[14] *See Buckley*, 424 U.S. at 261 (White, J., concurring in part and dissenting in part). It was this potential for abuse that motivated Congress to enact a public financing scheme, including § 9012(f) to diffuse the influence of large expenditures of money, which would "meet all major constitutional, practical and political objections." 117 Cong. Rec. 41,777 (remarks of Sen. Kennedy). A scheme so carefully designed after years of debate and congressional investigation cannot be easily disregarded.

A. Substantial Legislative History Supports Congress's Judgment That The General Welfare Of The Citizens Of The United States Is Best Served By Total Public Financing Of Presidential Elections.

There is "no aspect of public business which more directly affects the quality of government and the public welfare" than the electoral process. 117 Cong. Rec. 41,778 (1971) (remarks of Sen. Kennedy, *quoting* Sen. Gore). Supporters of public financing believed that private financing of presidential candidates "made a mockery of free democratic processes, undermining public confidence in those elected, and thus in the institution of government itself." *Id.* Congress determined that public financing was the means necessary to reestablish confidence in the electoral process and in government itself,

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[14] Indeed, where actions in the "judgment of Congress menace the integrity and the competency of [the political process], legislation to forestall such danger and adequate to maintain its usefulness is required." *United Public Workers* v. *Mitchell*, 330 U.S. 75, 103 (1947). And in the words of Senator John J. Williams, since "public confidence in the elective process is the foundation of public confidence in government, there is no higher duty of a democratic government than to insure that confidence." 112 Cong. Rec. 13,538 (1966) (remarks of Sen. Williams).

to promote widespread participation in presidential election campaigns and to assure candidate responsiveness to the voters. *See* 117 Cong. Rec. 41,771 (1971) (remarks of Sen. Mathias); 117 Cong. Rec. 41,767 (1971) (remarks of Sen. Bentsen). Abundant legislative history supports this congressional judgment.

The "idea of mass support for political campaigns" was articulated as early as 1907 by President Theodore Roosevelt. *See* H.R. Doc. No. 1, 60th Cong., 1st Sess., pt. 1 at XLVII (1910). Congress subsequently engaged in lengthy and comprehensive debate and investigation of the concept. Congressional committees were convened to collect and investigate all facts relating to campaign expenditures, contributions and other means of influence as an "aid in enacting any remedial litigation." S. Res. No. 225, 74th Cong., 2d Sess. (1936), *cited in* S. Rep. No. 151, 75th Cong., 1st Sess. 2 (1937). As early as 1937, one such Special Committee observed that

> [t]he need for remedial legislation in the field of Federal elections is imperative and immediate. . . . [and that] [f]ew, if any, reforms are more direly needed in our democratic society.

Id. at 5. Indeed, Committee findings

> poignantly demonstrate[d] the need for effective limitations upon the amount of individual contributions and the desirability of providing incentives for mass contributions, or perhaps governmental assumption of the cost and responsibility for the conduct of Federal election campaigns and the curtailment of private subsidization of election campaigns.

Id.

The first concrete congressional attempt at drafting a public financing scheme was the Presidential Election Campaign Fund Act of 1966, known as the Long Plan for its sponsor, Senator Russell Long. Title IV, Pub. L. No. 80-809, 80 Stat. 1587 (1966). The proposal would have enabled every person to contribute voluntarily $1.00, through a tax deduction system, to a special fund which would be divided equally between, and given directly to,

the major parties. Senator Long, speaking in support of his proposal when it was introduced on June 15, 1966, stated that the Plan would get away from a system where candidates for President of the United States are beholden to groups making large campaign contributions or "obligated to any special group." 112 Cong. Rec. 28,765 (1966) (remarks of Sen. Long). Indeed as Senator Cannon noted:

> We are all interested in minimizing the dependency of any candidate on narrow economic interests and we wish to broaden as much as possible the base of that economic support among the people whose participation is essential to a healthy political system. It is of vital importance, therefore, that means be devised to give to candidates and committees freedom from pressures or influence.

Hearings on S.3496 Before the Senate Committee on Finance, 89th Cong., 2d Sess. 31 (1966) (statement of Sen. Cannon).

Congressional debate discloses the major objectives which the 1966 Act was intended to serve: removing the potential for possible improper influence in government, 112 Cong. Rec. 28,248 (1966) (remarks of Rep. Mills), 112 Cong Rec. 28,765 (1966) (remarks of Sen. Long); stimulating individual interest in politics and broadening the base for individual participation in political campaigns, 112 Cong. Rec. 28,249 (1966) (remarks of Rep. Mills); permitting elected officials to remain "free from suspicion that some one individual or some segment of the economy with an ulterior motive had come in and contributed a large sum of money and made it possible, because of that contribution, to influence the outcome of an election." 112 Cong. Rec. 28,779 (1966) (remarks of Sen. Smathers). As one of the 1966 Act's leading opponents, Senator Gore, recognized:

> The root of corruption in politics is money and the love of power. The means by which the public will is frustrated is money. The means by which elections are manipulated, and contrived, and distorted

> is money and power . . . . Money threatens to destroy our democratic processes.

112 Cong. Rec. 13,544 (1966) (remarks of Sen. Gore).

Opponents of the 1966 Act, while aware of the need for urgent reform, were concerned that the proposal did not go far enough to provide sufficient safeguards for the purposes for which it was intended. In their estimation, the 1966 Act "[did] not inhibit [the] corrupt[ing] influences [of money], [did] not bring its use to public attention, [did] not limit its influence, [nor] regulate its movement and source." 112 Cong. Rec. 13,544 (1966) (remarks of Sen. Gore). The perceived lack of necessary controls over the raising and spending of private monies by committees in political campaigns did little to alleviate the greatest danger to the democratic elective process, the *quid pro quos*. 112 Cong. Rec. 28,083 (1966) (remarks of Sen. Gore). Opponents strenuously argued that without such controls the proposal could not assure that the presidential candidate who received public funds still would not be subject to the possible improper influence by those who would contribute in other ways to his or her campaign.

The lack of safeguards against the increased use of wealth, necessary to protect the elective processes from the "improper use of money, sometimes in excessive amounts," expended "in favor of special interest candidates," 112 Cong. Rec. 28,781 (1966) (remarks of Sen. Gore), was a major factor which led to the defeat of the 1966 Act. Indeed, without more, opponents feared that the Long Plan would merely be a subsidy and add "federal tax money . . . to what is otherwise available [and] increase rather than decrease the influence of money in federal elections." 112 Cong. Rec. 28,083 (1966) (remarks of Sen. Gore). *See also* 113 Cong. Rec. 8060 (1967).[16]

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[16] Congress also debated the apparent serious constitutional questions about the formula used to identify the eligible candidates, the practical effect being to exclude candidates who did not represent the two major parties. *Id. See also* 113 Cong. Rec. 8061 (1967) (remarks of Sen. Gore).

Debate over the 1966 Fund Act continued in 1967. During the debate, numerous amendments to the Long Plan were proposed to meet the objectives and concerns presented by opponents of the Plan, with the hope of avoiding repeal. Opponents of the Plan restated their position that the 1966 Act still did not go far enough to curb potential abuses. The most serious flaw was its failure to limit the "raising and spending of private funds on behalf of presidential candidates or any other candidates." Thus, "national fundraising drives [could] continue as before and the proceeds [could] be spent as they [had] been spent in the past." 113 Cong. Rec. 8063 (1967) (remarks of Sen. Gore). *See also* 113 Cong. Rec. 8304 (1967) (remarks of Sen. Gore).[16] Indeed, with regard to control of spending on behalf of federal candidates, Senator Gore observed:

> A candidate may not control . . . independent committees . . . There is no limit in the present law on the amount of money they can collect or spend. There is no limit provided by the pending amendment. The amendment . . . is unworkable. It does not include individuals at all. It could not, because of the constitutional provision against limitation on freedom of speech.

113 Cong. Rec. 9386 (1967) (remarks of Sen. Gore). Thus, on April 13, 1967, Congress voted to adopt an amendment which repealed the 1966 Fund Act. 113 Cong. Rec. 9397 (1967).

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[16] Indeed, Senator Long, admitting that his proposal was not perfect, characterized his Plan as a positive and necessary first step toward remedial campaign reform:

> I started out with the theory that by providing adequate financing for both major party candidates for President of the United States, we would eliminate the necessity of either of those candidates having to seek or accept any private contribution which might in any way tend to prejudice or even cast the suggestion of prejudice upon the activities and conduct of such candidate, should he be elected President of the United States. . . .

113 Cong. Rec. 8295 (1967) (remarks of Sen. Long).

Firm in the belief that campaign reform legislation was urgently needed in the electoral process, Senator Long, in 1967, supported by proponents of public financing, introduced the Honest Election Act of 1967, Amendment No. 167, on April 18, 1967. 113 Cong. Rec. 9978 (1967). Extensive Senate debate over the newly proposed Honest Election Act raised numerous objections. Viewed as an attempt to reenact the 1966 Act, the 1967 Act presented similar problems:

> There [was] no real effective prohibition against privately financed expenditures, even for the purpose listed in the amendment . . . . *The pending amendment contain[ed] no limit whatever on the amount that may be raised and spent from private sources in the conduct of a presidential election. . . . There would still be no effective limit on how much could be given, how much could be received, how much could be spent, for what it could be spent, or when it could be spent.* . . .

113 Cong. Rec. 10,201 (1967) (remarks of Sen. Gore) (emphasis added). Therefore, all that would be accomplished by the enactment of the 1967 Act would be to provide public funds to each major party for use in addition to whatever amounts could be raised privately. Critics of the 1967 Honest Election Act prevailed and the proposal was defeated. 113 Cong. Rec. 12,169 (1967). It was not until 1971 after years of protracted debate on the details of various provisions and continued investigation that Congress finally enacted reform legislation for presidential elections.

With the enactment of the 1971 Fund Act, a majority of the Congress concluded that the idea of public financing, which had been debated extensively throughout the twentieth century, was necessary to protect the presidential election process. Indeed, a majority of the Congress reaffirmed earlier determinations that public financing would foster public confidence and participation in the electoral process by "eliminat[ing] a source of public suspicion about government." 117 Cong. Rec. 41,780 (1971) (remarks of Sen. Hart). By remov-

ing private money and providing total public financing for presidential elections, the vital independence of the president would be preserved; the president would no longer be "beholden" to but free of special interests; and the pressure of money to control decisions of those elected would be eliminated. 117 Cong. Rec. 41,937, 41,938 (1971) (remarks of Sen. Mansfield). The advent of public financing would free the candidates from their "heavy depend[ence] on 'interested' givers who expect a return on their investment, usually in the form of some governmental favor or largesse." New York Times, June 11, 1971 at 35, col. 5, *reprinted in* 117 Cong. Rec. 41,779 (1971). *See also* 117 Cong. Rec. 41,780 (1971) (remarks of Sen. Cranston).

B. Section 9012(f) Is Necessary To Preserve The Integrity Of The Presidential Election Campaign Fund Act.

The public financing scheme rests on the eligibility requirements and expenditure limitations. In order to become an "eligible candidate" under the Fund Act, 26 U.S.C. § 9002(4), the individual must certify that he or she: has not and will not accept any private contributions; will adhere to an expenditure limitation; will maintain and furnish to the Commission, when requested, materials pertaining to the candidate's qualified campaign expenses; will submit to an audit and examination by the Commission after the election; and will make whatever repayments are required by the Commission. 26 U.S.C. § 9003. The candidate must also be the presidential nominee of a major party, as defined in 26 U.S.C. § 9002(6).[17] If these conditions are satisfied, and if the candidate so chooses, the candidate will receive $20,000,000 plus an adjustment for inflation, to defray all

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[17] A candidate of a minor or new party, as defined by 26 U.S.C. § 9002(7) and (8), may establish eligibility to receive public funds pursuant to the formula set out at 26 U.S.C. §§ 9004(a)(2) and (3), 26 U.S.C. 9003.

general election campaign expenses. 26 U.S.C. § 9004 (a) (1).[18]

Candidates who opt to receive public funds "must pledge not to incur qualified campaign expenses" in excess of the amount of public monies received under the Fund Act. 26 U.S.C. §§ 9003(b) (1), 9004(a) (1), and 9007(b); 2 U.S.C. § 441a(b) (1) (B).[19] Publicly financed candidates are prohibited from accepting any form of private financing to augment the public monies received and spent on behalf of their campaigns other than to compensate for deficiencies in the fund. 26 U.S.C. §§ 9003(b) (2), 9007(b) (3), and 9012(b) (1). The foregoing restrictions are in harmony with the conclusion that, "the public interest purposes behind the decision of Congress to provide for the financing of presidential elections would hardly be served unless some reasonable limits and conditions were imposed."[20] *Republican National Committee* v. *Federal Election Commission*, 487 F. Supp. 280, 285 (S.D.N.Y. 1980) (three judge court), 616 F.2d 1 (2d Cir. 1980) (en banc) (per curiam), *aff'd mem*, 445 U.S. 955 (1980) (*"Republican National Committee"*).

Of equal importance to this comprehensive legislative scheme is § 9012(f), the provision challenged herein, which permits political committees not authorized by the

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[18] The public allotment for the 1980 election was $29.4 million dollars per major-party candidate.

[19] Criminal penalties may be imposed on candidates who knowingly and willfully incur expenses in excess of their allotment. § 9012(a).

[20] Where congressional spending furthers first amendment values, as does public financing, *Buckley*, 424 U.S. at 93, Congress's power to condition its terms is quite extensive. *Republican National Committee, supra; American Communications Association* v. *Douds*, 339 U.S. 382, 417 (1950) (Frankfurter, J., concurring); *Oklahoma* v. *Civil Service Commission*, 330 U.S. 127 (1947). *See Wyman* v. *James*, 400 U.S. 309 (1971); *Richardson* v. *Belcher*, 404 U.S. 78 (1971); *Dandridge* v. *Williams*, 397 U.S. 471, 486 (1970); *Flemming* v. *Nestor*, 363 U.S. 603 (1960).

candidate to spend up to $1,000[21] to defray what would otherwise be qualified campaign expenses. The provision's background manifests congressional belief and determination that the public financing scheme required a limitation on the amount which unauthorized political committees could spend to further the election of publicly funded candidates. Congress concluded that § 9012(f) was necessary to prevent unauthorized committees from supplementing the almost 30 million dollars a presidential candidate would receive from the federal campaign fund.[22] Clearly, unlimited spending by these unauthorized committees to defray what would otherwise be qualified campaign expenses on behalf of publicly funded candidates is inconsistent with the will of Congress. *See* discussion, *supra* at 12-18, *infra* at 22-23.[23]

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[21] No political committee may inadvertently violate the § 9012(f) expenditure limitation. Criminal penalties attach only for knowing and willful violations of the subsection.

[22] Indeed, during the 1980 presidential election campaign, independent expenditures for publicly funded candidates totalled approximately $11.5 million. *See Data* at VII.

[23] Congress understood that unauthorized independent political committees raising large amounts of contributions and using this aggregated wealth to defray qualified campaign expenses on behalf of presidential candidates presented similar dangers of *quid pro quos* and the appearance of corruption which surround large contributions to presidential candidates. Spending by unauthorized political committees on behalf of presidential candidates has increased dramatically during the past four years. Congress concluded that without § 9012(f) such spending would continue to rise, bringing with it the very cloud of suspicion over the presidential campaign that the Fund Act was designed to dispel. The power and influence that these committee leaders could exert or appear to exert over the particular presidential candidate will once again cause the deterioration of public confidence in their elected officials and again have the potential to reduce individual participation in the electoral process, consequences Congress sought to avoid. *See Buckley*, 424 U.S. at 261 (White, J., concurring in part and dissenting in part). Indeed, this Court has held that the Fund Act, insofar as it eliminates the appearance of corruption, promotes a compelling governmental interest. *Buckley*, 424 U.S. at 91, 95; *Republic National Committee*, 487 F. Supp. at 285, *aff'd mem.*, 445 U.S. 955 (1980); *see* discussion, *infra* at 33-40.

Section 9012(f) did not go unchallenged in the Senate. Indeed, Congress "struggled" with all of the provisions involving campaign expenditure limits to arrive at a "reasonable" balance. 117 Cong. Rec. 42,627 (1971) (remarks of Sen. Pastore and Sen. Long).[34] Proposed amendments to § 9012(f) would have broadened the scope of its coverage. An amendment proposed by Senator Miller and subsequently passed by the Senate, 117 Cong. Rec. 42,626 (1971), made it a "knowing and willful violation" for individuals to spend more than $1,000 during the general election campaign. And an amendment proposed by Senator Cook would have limited to $1,000 spending by *individuals* "absolutely independent of the candidate." 117 Cong. Rec. 42,626 (1971) (remarks of Sen. Pastore).[35]

Strenuous objections, founded on constitutional grounds, were voiced by Senators Long and Pastore. With the passage of the Miller amendment and possible passage of the Cook amendment, these Senators feared that "nobody [could] do anything" at all in the general election,

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[34] Candidates opting for public funding of their campaigns would be limited to a designated amount of public funds to defray qualified campaign expenses, individuals unable to contribute to such candidates would be free to make unlimited independent expenditures during the general election campaign, and unauthorized political committees would be limited to expenditures of $1,000, received from individual contributions. To sever one of the limitations would upset this balance. *See Champlin Refining Co.* v. *Corporation Commission*, 286 U.S. 210, 234 (1932) *cited in Buckley*, 424 U.S. at 108-9.

[35] Other proposals would have strictly limited private spending and public discussion. Indeed, concerns over the circumvention of the overall candidate expenditure limitation and of the ban on spending by corporations and labor organizations prompted Senator Taft to propose an amendment which would have deleted the term "political committee" from § 9012(f) and substituted in lieu thereof "any corporation, labor organization, partnership, association, political committee, political education committee or any other committee." *See* 117 Cong. Rec. 42,397 (1971) (remarks of Sen. Taft). (1971). After full debate, the measure was rejected. *See* 117 Cong. Rec. 42,402 (1971).

"even on an individual basis." 117 Cong. Rec. 42,626 (1971) (remarks of Sen. Long). Such a provision might raise a constitutional challenge as a direct impingement on the individual's first amendment right of free speech. *Id.* at 42,627. The Cook amendment was subsequently rejected by the Senate, 117 Cong. Rec. 42,627 (1971) and the Miller amendment was finally stricken from the Fund Act in Conference.

Section 9012(f) was the narrowly drafted compromise to address important governmental interests while protecting the individual's right to directly participate in the electoral process. Senator Taft stated that such a provision would "prevent any political committees from being formed as a subterfuge so that they can go beyond the authorization of the committees and make expenditures that were not within the limitations of the expenditures which are in the bill." 117 Cong. Rec. 42,397 (1971) (remarks of Sen. Taft). *See* 117 Cong. Rec. 42,397 (1971) (remarks of Sen. Taft) (". . . this language is necessary purely to accomplish the purpose of this bill."); 117 Cong. Rec. 41,780 (1971) (remarks of Sen. Cranston) ("The amendment could at painfully long last, liberate American political parties from financial dependence on big money, big pressure groups and big spenders of all kinds. . . .").[26] *See also* 117 Cong. Rec. 41,780 (1971) (remarks of Sen. Hart). Section 9012(f) was thus rooted in Congress's wise, indeed expert, assessment of the potential danger of *quid pro quos* in allowing political committees to dominate presidential campaigns, spending vast sums of money to secure the election of presidential candidates.[27]

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[26] Indeed, without § 9012(f) Congress understood that political committees would be able to avoid the Fund Act's limitations and expend unlimited amounts of private monies on behalf of publicly financed candidates.

[27] And as this Court has acknowledged, the risk that presidential candidates may become, or even appear to be, beholden to these private benefactors is the precise evil which the Fund Act

Concluding that some limit on expenditures by unauthorized committees was necessary to preserve the integrity of the public financing system, Congress determined that a limitation of $1,000 would best serve this purpose. Well aware of the high cost of federal campaigns, Congress acknowledged that "when you incur an expense to promote the candidacy of a presidential candidate, $1,000 is small." 117 Cong. Rec. 42,399 (1971) (remarks of Sen. Pastore).[28] Nevertheless, Congress concluded that permitting unauthorized political committees to spend up to $1,000 to defray what would otherwise be qualified campaign expenses was necessary to avoid the deleterious influence of "big money" in presidential election campaigns, and to prevent the circumvention of the expenditure limitations, while protecting first amendment rights.[29]

In the ten years since congressional enactment of the Fund Act and the five years since *Buckley*, *supra*, Congress's judgment has proven correct. Assessment of the role of independent expenditures has drastically changed

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sought to eradicate. *Buckley*, 424 U.S. at 91, 96; *Republican National Committee*, 487 F. Supp. at 284, *aff'd mem.*, 445 U.S. 955 (1980).

[28] The choice of that figure is a permissible legislative judgment requiring the deference of this Court. As Mr. Justice Holmes argued more than fifty years ago:

> . . . when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark.

Louisville Gas Co. v. *Coleman*, 277 U.S. 32, 41 (1928) (Holmes, J., dissenting); *Burroughs* v. *United States*, 290 U.S. at 547. *See also Marchioro* v. *Chaney*, *supra*; *Buckley*, 424 U.S. at 13 n.16. A conclusion that the $1,000 ceiling is too low, imposing an undue burden on first amendment rights, does not require that the concept of § 9012(f) be held unconstitutional. *Buckley*, 424 U.S. at 83.

[29] Congress is fulfilling a public trust by ensuring that the monies directed by the taxpayers to the public fund are in fact accomplishing the purposes of the fund. *See Wyman* v. *James*, 400 U.S. at 318-19 ("The agency, with tax funds provided from federal as well as from state sources, is fulfilling a public trust).

from "independent expenditures [may become] one of the most important elements in a changing political process," [30] *Buckley*, 424 U.S. at 46, to "this big money casting a dark cloud over the integrity of the American political system will become a great issue and the American people will demand a stop to it." [31] Today, the real possibility of a *quid pro quo* arises not from the "small voices" of contributors but from those limited number of political committee decisionmakers who determine where and when each committee's resources will be allocated.[32] The collectors of contributions have replaced the givers of contributions as the source of actual or apparent corruption.[33]

Commission figures indicate that at least $9 million in independent expenditures were made on behalf of the Republican presidential candidate in the 1980 general election. *Data* at 334.[34] In contrast, $1,646,540 in independent expenditures were spent for or against publicly financed presidential candidates in the 1976 general election. The bulk of the money spent in 1980 came from

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[30] An Analysis of the Impact of the Federal Election Campaign Act, 1972-78, Final Report to the Committee on House Administration by the Campaign Finance Study Group, the Institute of Politics, Harvard University 5-12 (May 1979).

[31] News Comments of Vice President Walter F. Mondale—St. Paul, Minnesota—November 5, 1980.

[32] *See* FEC J.S. at 27.

[33] *United States* v. *International Union, United Automobile, Aircraft and Agricultural Implement Workers of America* (UAW-CIO), 352 U.S. 567 (1957); *United States* v. *Congress of Industrial Organizations*, 335 U.S. 106 (1948). This Court recognized the compelling need to prevent the aggregated wealth of large special interest groups from improperly influencing the outcome of federal elections. *See also United States* v. *CIO*, 335 U.S. at 145, 146 (Rutledge, J., concurring).

[34] The experience of the 1980 presidential election provides information which was not before the lower court because of the timing of the lawsuit but which is indispensible to a determination as to the validity of § 9012(f).

five non-party connected political action committees: the Congressional Club—$3,358,796, *Data* at 148; NCPAC—$2,102,301; *Data* at 184; FCM—$1,772,535; *Data* at 222; AEP—$1,270,208, *Data* at 224; and AFC—$711,856, *Data* at 230. The decisionmaking process of the five committees is composed of party and political professionals.[35] Surely, it would be "naive to think that these types of political activities are motivated at these levels by some academic interest in 'democracy' or other public service impulse." *Elrod* v. *Burns*, 427 U.S. 347, 385 (1976) (Powell, J., dissenting). Such facts are not lost on the voting public. Indeed, the Washington Post recently reported that:

> White House political advisor Lyn Nofziger yesterday defended the activities of groups such as the National Conservative Political Action Committee (NCPAC) saying that they create "a climate of doubt" about Democrats and are "on balance" a help to the Reagan administration. "I have a feeling that you have to go out and establish the negatives," Nofziger said.

Washington Post, May 5, 1981, at A3, col. 1.

Thus, money that a candidate could spend to communicate a message to the voters must now be spent in answering not the charges of an opponent but attacks by politi-

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[35] The Congressional Club has as its honorary chairman Senator Jesse Helms of North Carolina. Senator Helms stated that while the Committee was independent of the Reagan campaign, such an arrangement has made it awkward to communicate with the candidate: "I've had to, sort of, talk indirectly with Paul Laxalt (the national chairman of the Reagan campaign). I hope that he would pass along, uh, and I think the messages have gotten through all right." New York Times, September 22, 1980, A26, col. 2. In New Hampshire, FCM "pumped in sixty thousand dollars worth of newspaper ads when the group learned through the media that Reagan was in trouble." ABC News Nightline, July 7, 1980. *See also* The Boston Globe, February 5, 1981 at 13, col. 1. AFC has a "steering committee that includes 63 corporate executives, 34 retired House members, 5 Senators (3 retired), 10 retired governors and 5 former ambassadors." National Journal, September 13, 1980 at 1515. Similarly, AEP is "laden with former officials from the Ford and Nixon Administration." *Id.*

cal committees responsible to no one, not even to their own contributors. The amounts which appellee political committees hoped to spend to further the election of one candidate are enormous by any standard. AFC hoped to raise and spend twenty to thirty million dollars; AEP, twelve to fifteen million; and FCM, three to ten million.[36] The potential total of fifty-five million dollars is nearly twice the amount a publicly funded candidate is allowed to spend. Although appellee committees fell short of their dential election will be awash in expenditures by unauthorized political committees is very real. Paul Wilson, media advisor for AEP, views independent expenditure committees as the wave of the future. Mr. Wilson predicts that:

> . . . if we don't do anything by 1982 and certainly by 1984, there are going to be literally hundreds of independent expenditure committees that will raise funds independently broadcasting messages, in some cases, without any control by the candidates and campaign staff and in some cases merely pocketing the money. So if we do nothing it is going to explode.

Presentation by Paul Wilson, *FECA: After a Decade of Political Reform, A National Conference by Citizens' Research Foundation* (April 3, 1981).

Moreover, whatever the outcome of the debate among political scientists and the media as to the actual effectiveness of independent expenditures, the public percep-

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[36] By comparison, each political party is limited to expenditures totalling $4.7 million in support of the party's presidential candidate. *See* discussion, *infra* at 44-45. All registered political party committees at the National, State, and local level itemize "441a(d)" expenditures, made on behalf of federal candidates, on reports filed with the FEC. Reports filed for the 1979-80 election period disclose the following: Democratic party committee § 441a(d) expenditures totalled approximately $4.7 million for all federal candidates with 73% expended on the presidential campaign; Republican party committee § 441a(d) expenditures totalled approximately $11.7 million for all federal candidates with 39% expended on the presidential compaign.

tion of independent expenditures is that they are of value to the candidates and that thus the candidate will feel grateful to those groups making the expenditures.[37] The public hears James Baker, III, political strategist for the Regan campaign and now White House Chief of Staff observe that: "[t]here's some risk they'll get out there and be so negative that it would be counterproductive. On the balance, though, we would probably rather see the expenditures be made." Newsday, September 28, 1980 at 25, col. 3. The public reads of Richard Viguerie, co-founder of NCPAC, meeting with President Reagan at the White House and commenting afterwards that "[w]e're making some progress" adding "[w]e'll be keeping the pressure on."[38] A voting public scarred by past electoral abuses and reflecting a healthy skepticism of the intentions of professional politicians, must question whether a *quid pro quo* arrangement has been struck. With section 9012(f), Congress determined in advance that this question should not and need not even be asked. Congress's judgment should be affirmed to preserve the stated purposes of public funding and to protect the integrity of the electoral process.

C. Section 9012(f) Is Entitled To A Presumption Of Constitutionality.

Congressional enactments such as the Fund Act come to the Court under the presumption of constitutionality. *Flemming* v. *Nestor*, 363 U.S. at 617. Further, legislative findings by the Congress upon which the legislation rests are accepted by the courts unless irrational or unreasonable. *See, e.g., McGowan* v. *Maryland*, 366 U.S. 420, 426 (1961); *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152-153 (1938). Indeed, faced with first amendment challenges regarding the regulation of advertising space in *Lehman* v. *City of Shaker Heights*, 418 U.S. 298,

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[37] Both the Democratic and Republican National Committees, however, have been critical of such expenditures. The Washington Star, May 6, 1981, A6, col. 1.

[38] Knight Newspapers, February 18, 1981, *cited in* The American Political Report, Vol. X, No. 12, February 27, 1981 at 1.

303, 304 (1974), this Court questioned whether the policies and practices were "arbitrary, capricious, or invidious" and concluded that the city had advanced 'reasonable legislative objectives.'" Emerson, First Amendment Doctrine and the Burger Court, 68 Cal. L. Rev. 422, 442 (1980); *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973). *See also Fullilove* v. *Klutznick*, —— U.S. ——, 100 S.Ct. 2758 (1980); *California* v. *LaRue*, 409 U.S. 109 (1972); *United States* v. *Robel*, 389 U.S. 258, 271, 285 (1967) (Brennan, J., concurring; White and Harlan, J.J., dissenting); *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, 94-95, 169-70 (1961).[39]

Moreover, this Court has declared that:

> The power of Congress to protect the election of President and Vice-President from corruption being clear, the choice of the means to that end presents a question primarily addressed to the judgment of Congress.

Burroughs v. *United States*, 290 U.S. at 547 (1934). *See also Marchioro* v. *Chaney*, *supra*; *Buckley*, *supra*. To that end, Congress chose public financing as the means to encouraging individual participation in the electoral process. *See* 117 Cong. Rec. 41,775 (1971) (remarks of Sen. Pastore); 117 Cong. Rec. 41,937 (1971) (remarks of Sen. Mansfield); 117 Cong. Rec. 41,780 (1971) (remarks of Sen. Hart); 117 Cong. Rec. 42,397 (1971)

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[39] By analogy, in upholding congressional enactments under the Commerce Clause and Section 5 of the fourteenth amendment the Court has consistently held that it is for Congress to determine the facts and weigh the various considerations, subject only to a requirement of rationality. *Oregon* v. *Mitchell*, 400 U.S. at 133, 248 (opinions of the Court and of Justices Brennan, White and Marshall dissenting); *Katzenbach* v. *Morgan*, 384 U.S. 641, 653, 656 (1966); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 258, 261-62 (1964); *Katzenbach* v. *McClung*, 379 U.S. 294, 303-04 (1964). The same rule applies under the Due Process Clause. *McClean* v. *Arkansas*, 211 U.S. 539, 550-51 (1909); *Munn* v. *Illinois*, 94 U.S. 113, 125 (1877).

(remarks of Sen. Taft).[40] Such congressional appraisal of the need for the Fund Act's limitations rests on a solid foundation of experience and protracted debate. Congress's judgment is indeed reasonable and entitled to deference.

Although the court below chose to ignore such legislative findings dating back to 1907, the legislative history clearly establishes that the statutory provisions

> did not steal upon an unsuspecting legislature, and pass unobserved. Its principle was completely understood, and was opposed with equal zeal and ability. After being resisted first in the fair and open field of debate . . . and being supported by arguments which convinced minds as . . . intelligent as this country can boast, it became a law. . . .

McCulloch v. *Maryland*, 4 Wheat. at 420. Indeed, as reiterated recently by this Court, "it is up to legislatures, not courts, to decide on the wisdom and utility of legislation," *State of Minnesota* v. *Clover Leaf Creamery Co.*, —— U.S. ——, 101 S.Ct. 715, 726 (1981) *citing Ferguson* v. *Skrupa*, 372 U.S. 726, 729 (1963). *See also Buckley*, 424 U.S. at 260. (White, J., concurring in part and dissenting in part.) Even in the first amendment area, this Court has declared that "the judgment of the Legislative Branch cannot be ignored or under-valued simply because one segment . . . casts its claim under the umbrella of the First Amendment." *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. at 103. *See also Fullilove* v. *Klutznik*, *supra*. Rather, when faced with a "complex problem with many hard questions and few easy answers," the Court does "well to pay careful attention to how the other branches of government have addressed the same problem," and how Congress has examined legislative developments. *Id.* Indeed, it is the Congress which has the resources and the power to inform itself and is the appropriate forum where the conflicting pros and cons are presented and considered. *United States* v. *Robel*, 389 U.S. at 276.

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[40] This court has long recognized that so long as the goals of congressional legislation are constitutional, the manner and means

To "accept the judgment of Congress as to what legislation is appropriate" does not involve a "surrender of the Court's function as ultimate arbiter in disputes over interpretation of the Constitution." *Welsh* v. *United States*, 398 U.S. 333, 371 (1970) (White, J., dissenting). However, in the words of Mr. Justice Frankfurter, even first amendment

> cases are not an exception to the principle that we are not legislators, that direct policymaking is not our province. How best to reconcile competing interests is the business of legislators, and the balance they strike is a judgment not to be displaced by ours, but to be respected unless outside the pale of fair judgment.

Dennis v. *United States*, 341 U.S. 494, 539-40 (1951). (Frankfurter, J., concurring).[41] Congress has spoken; its judgment should be affirmed.

II. THE DISTRICT COURT HELD UNCONSTITUTIONAL AN INTEGRAL PROVISION OF THE PRESIDENTIAL ELECTION CAMPAIGN FUND ACT WITHOUT REGARD TO CONGRESS'S JUDGMENT AS TO ITS NECESSITY AND AS TO ITS CONSTITUTIONALITY.

The district court, however, failed to give even cursory consideration to the seventy year history of campaign reform legislation aimed at bringing meaningful reform to the area of financing presidential election campaigns. Indeed, the lower court's sole reference to legislative history in the course of its twenty-seven page slip opinion is

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for obtaining those goals are deemed legitimate. If the end is legitimate and constitutional, "all means . . . which are plainly adopted to that end, which are not prohibited", but are in the "spirit of the Constitution, are constitutional." *McCulloch* v. *Maryland*, 4 Wheat. at 421.

[41] And in the words of Mr. Justice Holmes, when a legislature "has intended its will . . . that will should be recognized and obeyed." *Johnson* v. *United States*, 163 F. 30, 32 (1st Cir. 1908). *Cf., Landmark Comm. Inc.* v. *Virginia*, 435 U.S. 829 (1978).

contained in a two and one-half line footnote regarding a jurisdictional provision of the Fund Act. *See* FEC J.S. App. A at 30a, n.50.[42] The district court did not explain why it chose to ignore the legislative determination that a limitation on the amount which unauthorized political committees could spend to further the election of publicly funded candidates is an essential component of the public financing scheme.[43] It seems clear, however, that the court below disregarded this determination and rendered its decision absent adequate attention to the legislative concerns that have characterized Congress's seventy year attempt to eliminate the dangers of real or apparent corruption in connection with presidential election campaigns.

The district court deemed 26 U.S.C. § 9012(f) not necessary to prevent real or apparent corruption, thus failing to serve a compelling interest. FEC J.S. App. A at 21a. The court thus rejected expert congressional assessment of the potential danger of allowing political committees to amass, control and spend vast sums to influence the election of publicly financed presidential candidates. Rather, the court found, as a matter of law, that such "political committees cannot wield [a] *Quid Pro Quo*." *Id.* The court decided that appellee political committees[44] are "simply 'pooling agents' for many small

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[42] The court correctly relied on the legislative determination that the purpose of § 9011(b) was to authorize federal courts to expeditiously hear and decide actions brought to implement or construe the Fund Act. The court nowhere made clear why inquiry into the legislative purpose was appropriate with regard to § 9011(b) but inappropriate with regard to the constitutionality of § 9012(f), a central feature of a significant Act of Congress.

[43] By holding invalid § 9012(f) the lower court may have produced a statute which will ultimately operate contrary to congressional intent. *See, e.g., Buckley*, 424 U.S. at 235-36 (Burger, C.J., dissenting).

[44] To be sure, the definition of "political committee" is well-accepted and survives a vagueness argument. Both the court of appeals in *Buckley* v. *Valeo*, 519 F.2d 821, 901 (D.C. Cir. 1975), and this Court, 424 U.S. at 79, upheld the constitutionality of these definitions against plaintiffs' vagueness challenge.

voices." FEC J.S. App. A. at 17a. Apparently, as its premise, the court believed that these "pooling agents" would merely, as a public service to the individual contributors it seems, lend a "professional touch" to "political speech common to *all* of the member-contributors." FEC J.S. App. A at 19a (emphasis added). The court cites no support for these conclusions. Nor does the court point to any empirical data to substantiate its questionable premises. In sum, the court below struck down a congressional judgment in the area of electoral reform by substituting its own speculations as to the realities of political life.

It is clear that deference to congressional judgment is appropriate in "the political arena where the expertise of legislators is at its peak and that of judges is at its very lowest." [45] The lower court's foray into the largely unfamiliar territory of the political process without the benefit of legislative guidance attests to the sagacity of that statement.[46] The case before this Court is not one in which "the history", in the words of Mr. Chief Justice

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[45] *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 804 (1978) (*"Bellotti"*) (White, J., dissenting). *See also Buckley*, 424 U.S. at 261 (White, J., concurring in part and dissenting in part). *See also* discussion *supra* at 13-24.

[46] The opinion of the court below was filed by Judge Wilkey. In the context of another election law case, it was Judge Wilkey who recognized that:

> The penchant of this court to give no deference whatsoever to the responsible agency's interpretation of its role and basic statute has been noted with acerbity by the Supreme Court in *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519 (1978) . . .

Democratic Senatorial Campaign Committee v. *Federal Election Commission*, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 51,053 at 51,060 n.2 (D.C. Cir. October 9, 1980) (three-judge court) (Wilkey, J., dissenting), *probable jurisdiction noted* in No. 80-939 (March 2, 1981). Clearly, if deference to the responsible agency's interpretation of the statute is desirable, deference to the legislature is required.

Warren, is "inconclusive."[47] The district court's finding that § 9012(f) exceeded constitutional limitations, without regard to the extensive congressional debate to the contrary, must be reversed.

III. THIS COURT'S PRIOR DECISIONS SUPPORT THE CONSTITUTIONALITY OF § 9012(f).

This Court has held constitutional other expenditure limitations enacted by Congress to protect the integrity of public financing of presidential elections. *Republican National Committee, supra*; *Buckley, supra*. These cases accorded constitutional significance to the distinction which Congress drew between a person spending money directly for speech and a person giving money to a political committee to be spent for speech. *See also California Medical Association* v. *Federal Election Commission*, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9127 (9th Cir. May 23, 1980), *possible jurisdiction postponed* No. 79-1952 (October 6, 1980); *Mott* v. *Federal Election Commission*, 494 F. Supp. 131, 137 (D.D.C. 1980), *appeal docketed*, No. 80-1949 (D.C. Cir. Aug. 12, 1980), *appeal docketed*, No. 80-2069 (D.C. Cir. Sept. 4, 1980) (distinction drawn between direct and indirect expression).

In *Buckley*, this Court reviewed challenges to the constitutionality of various provisions of the Federal Election Campaign Act and of the Presidential Election Campaign Fund Act.[48] As to challenges to the Fund

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[47] *Brown* v. *Board of Education*, 347 U.S. 483, 489 (1954).

[48] The Federal Election Campaign Act of 1971 ("the Act" or "FECA"), Pub. L. No. 92-225, 86 Stat. 3, was amended by the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263; by the Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475; by the Federal Election Campaign Act Amendments of 1977, Pub. L. No. 95-216, 91 Stat. 1655; and by the Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339. The relevant provisions of the Act are codified in Title 2 of the United States Code. As discussed, *supra*, the Presidential Election Campaign Fund Act ("the Fund Act") was enacted in 1971, Pub. L. No. 92-178, 85 Stat. 573 (1971).

Act, this Court found no merit in claims that the challenged provisions of the Fund Act violate either the first or the fifth amendment. *Buckley*, 424 U.S. at 86.[49] Although the Court invalidated expenditure limitations found in FECA because they did not serve the "substantial governmental interest in stemming the reality or appearance of corruption in the electoral process," 424 U.S. at 48, all challenged expenditure limitations in the context of publicly financed campaigns were upheld.[50]

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[49] 26 U.S.C. § 9012(f) itself was not challenged in *Buckley, supra*, and the Court rejected as unripe challenges to other subsections of 26 U.S.C. § 9012. *See*, Answers to Certified Questions, 424 U.S. at 143 n.178, *aff'g* 519 F.2d at 898-900.

[50] Similarly, FECA's prohibition on the use of corporate treasury funds to make independent expenditures in connection with federal elections, 2 U.S.C. § 441b, has been held constitutional by numerous fededal courts. *Federal Election Commission* v. *Lance*, 635 F.2d 1132 (5th Cir. 1981) (en banc); *Bread Political Action Committee* v. *Federal Election Commission*, 635 F.2d 621 (7th Cir. 1980), (en banc), *appeal docketed* No. 80-1481 (March, 1981); *California Medical Association* v. *Federal Election Commission*, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9127 (9th Cir. May 23, 1980), *possible jurisdiction postponed* No. 79-1952 (October 6, 1980); *United States* v. *Chestnut*, 533 F.2d 40, 51 n.12 (2d Cir. 1976), *cert. denied*, 429 U.S. 829 (1976); *United States* v. *Boyle*, 482 F.2d 755 (D.C. Cir. 1973), *cert. denied*, 414 U.S. 1076 (1973); *United States* v. *Pipefitters Local Union No. 562*, 434 F.2d 1116 (8th Cir. 1970), *adhered to en banc*, 434 F.2d 1127, *rev'd on other grounds*, 407 U.S. 385 (1972); *Federal Election Commission* v. *National Right to Work Committee*, 501 F. Supp. 422 (D.D.C. 1980), *appeal docketed*, Nos. 80-1487, 80-1488 (D.C. Cir. May 7, 1980); *Federal Election Commission* v. *Weinsten*, 462 F. Supp. 243 (S.D.N.Y. 1978); *United States* v. *Clifford*, 409 F. Supp. 1070, 1072 (E.D.N.Y. 1976); *United States* v. *Brewers' Association*, 239 F. 163 (W.D. Pa. 1916). And this Court has avoided any judgment on the constitutionality of § 441b, while recognizing Congress's right to evaluate the need for remedial legislation to protect the integrity of the federal election process. *See Pipefitters Local Union No. 562* v. *United States*, 407 U.S. 385 (1972); *United States* v. *International Union, United Automobile, Aircraft and Agricultural Implement Workers of America* (UAW-CIO), *supra; United States* v. *Congress of Industrial Organizations, supra.*

Preliminarily, the Court found that "public financing of Presidential elections as a means of reforming the electoral process" was a legitimate choice made by Congress pursuant to its power to legislate for the "general welfare." *Buckley*, 424 U.S. at 90; United States Constitution, art. 1, § 8, cl. 2. Accordingly, the Court upheld Congress's choice of prior election vote totals to determine candidate eligibility. *Buckley*, 424 U.S. at 97. This Court noted:

> Without any doubt a range of formulations would sufficiently protect the public fisc and not foster factionalism, and would also recognize the public interest in the fluidity of our political affairs. We cannot say that Congress' choice falls without the permissible range.

424 U.S. at 104.[81] Moreover, the Court in *Buckley* specifically held that its holdings invalidating FECA's expenditure limitations did not "require the conclusion that [public financing of presidential campaigns] is unconstitutional."[82]

In *Republican National Committee, supra*, this Court affirmed the conclusion of the United States Court of Appeals for the Second Circuit (en banc) and the three-judge court convened pursuant to 26 U.S.C. § 9011(b) that public financing of presidential campaigns does not violate the first amendment rights of either a publicly

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[81] The Court similarly upheld the 10-state requirement for eligibility for presidential public funding, *Buckley*, 424 U.S. at 104 n.140; public funding of party conventions, 424 U.S. at 104, and primary election campaign financing, 424 U.S. at 105. *See also Gelman* v. *Federal Election Commission*, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9130 at 51,021 n.13 (D.C. Cir. July 18, 1980), *cert. denied*, —— U.S. ——, 101 S.Ct. 219 (1980). Section 9012(f) itself serves to guard against factionalism and splintering of the political party system. *See* discussion, *infra* at 38-40.

[82] Recognizing that "the expenditure limitations accepted by a candidate to be eligible for public funding are identical" to "the FECA expenditure limits, the Court had "no difficulty in concluding" that the public financing provisions were severable and constitutional. *Buckley*, 424 U.S. at 108.

funded candidate or the candidate's supporters. 487 F. Supp. at 284. Acceptance of public financing being voluntary, the court held that

> The supporters may not complain that the government has deprived them of the right to contribute. . . . As in *Marchioro* v. *Chaney*, 442 U.S. 191, 99 S.Ct. 2243, 22848, 60 L.Ed. 816 (1979), the complaint of the contributors should be addressed to the candidate who has chosen to forego private financing, rather than to the court.

487 F. Supp. at 286, *aff'd mem.*, 445 U.S. 955 (1980).[53]

Thus, this Court has reviewed the expenditure limitations which Congress included in the Fund Act on two occasions. On both occasions, all expenditure limitations were held constitutional. *Republican National Committee, supra*; *Buckley, supra.* Correct application of the principles of these cases requires a finding that 26 U.S.C. § 9012(f) is also constitutional. The district court's finding to the contrary is inconsistent with this Court's prior rulings in cases directly on point.

Moreover, the district court's conclusion represents a serious misapplication of this Court's statement in *Bellotti, supra*, that free expression may not be limited on the basis of the "identity of its source, whether corporation, association, union or individual." *Id.* at 777.[54] Contrary

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[53] The court also noted the many options available for individual support of a candidate in a publicly financed campaign, 487 F. Supp. at 286, *aff'd mem.*, 445 U.S. 955 (1980), and recognized that this Court in *Buckley* held the Fund Act constitutional. In *Buckley*, this Court stated:

> Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations. Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forego private fundraising and accept public funding.

Buckley, 424 U.S. at 57 n.65.

[54] The statute reviewed in *Bellotti* is critically different from § 9012(f). *Bellotti* involved a statute which banned entirely certain corporate expenditures, 435 U.S. at 767-768, while § 9012(f) merely limits the amount which political committees may spend

to the district court's apparent assumption, *Bellotti* did not hold that corporations or any other artificial entities (such as political committees) are entitled to the same protection under the first amendment as are natural persons. 435 U.S. at 775-776. Rather, this Court in *Bellotti* recognized that the first amendment is primarily designed to protect individual self-expression [55] from governmental intrusion and to ensure that the rights of hearers to open and informed discussion are not unnecessarily abridged. 435 U.S. at 783. *See also* 435 U.S. at 804, 807 (White, J., dissenting). As previously discussed, public financing of presidential elections was specifically designed by Congress to promote individual participation in the federal election process and to provide adequate funding so that presidential candidates can devote the majority of their energies to the discussion of issues with the electorate. *See* discussion, *supra* at 12-18. Section 9012(f) itself does nothing to prevent any individual or group of individuals from voicing their views or supporting candidates of their own choosing. Rather, § 9012(f) encourages this active individual political participation rather than the passive act of merely contributing to a political committee.[56]

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to further the election of publicly funded candidates. *Bellotti* applied to votes on referenda, 435 U.S. at 768; § 9012(f) is directed only at publicly funded presidential candidate election campaigns. *Bellotti* held that the Massachusetts statute was essentially an attempt by the state to control the focus and content of public debate, 435 U.S. at 785. However, § 9012(f) applies in a nonpartisan manner to all unauthorized political committees and only with regard to what would otherwise be qualified campaign expenditures incurred in support of publicly funded presidential candidates. Section 9012(f) does not in any manner limit issue discussion.

[55] *Buckley, supra,* held that the self-expression of the contributor to a political committee was accomplished by the symbolic act of making the contribution. 424 U.S. at 21. Section 9012(f) itself places no limitation whatsoever on an individual's right to contribute to political committees.

[56] Independent expenditures by individuals and authorized candidate committees for or against publicly funded presidential candidates totalled $1,994,111 during 1980. *See Data* at VI n.17 and VII.

In *Bellotti*, this Court expressly noted that restrictions on spending may well be permissible in the context of partisan candidate elections, where the governmental interest in preventing "corruption of elected representatives through the creation of political debts . . . has never been doubted." 435 U.S. at 787, n.26. The Court went on to make it clear that

> [t]he case before us presents no comparable problem, and our consideration of a corporation's right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office.

Id. The instant case, on the other hand, squarely poses the question of whether Congress may limit expenditures based upon its assessment of the implicit obligations that may result between those who amass and control vast sums and the publicly funded candidate on whose behalf these monies are spent. Indeed, it is this very question which this Court suggested should be answered in the affirmative:

> Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections.

435 U.S. at 787 n.26. Certainly, Congress is entitled to make the same finding with regard to expenditures by political committees and to enact prophylactic legislation.

Additionally, the district court's judgment disregards § 9012(f)'s function in serving the "compelling" governmental interest in protecting the stability of the political system by refraining from encouraging "splintered parties and unrestrained factionalism [that might] do significant damage to the fabric of government." *Storer* v. *Brown*, 415 U.S. 724, 736 (1974). *See also Buckley*, 424 U.S. at 96. Such "unrestrained factionalism" was of much concern to the Founding Fathers. James Madison, for example, thought it a principal task of the new Constitution to hold the "mischief of factions" in check. Federalist No. 10 at 52 (H.C. Lodge ed. 1888).

Strong political parties serve the purpose of preventing factionalism in the political process. As Justice Powell has recognized,

> "[b]road-based political parties supply an essential coherence and flexibility to the American political scene. They serve as coalitions of different interests that combine to seek national goals.

Branti v. *Finkel*, 445 U.S. 507, 532 (Powell, J., dissenting). And a distinguished panel of political scientists has concluded that:

> Without parties there can be no organized and coherent politics. When politics lacks coherence, there can be no accountable democracy; therefore, parties are indispensable to the realization of democracy, and financing is control to parties.

Hearings on H.R. 1 Before the Committee on House Administration, 96th Cong., 1st Sess. 392 (1979) (statement of the Committee on Party Renewal). Indeed, strong parties and candidates responsible to parties help "to make government accountable." *Elrod* v. *Burns*, 427 U.S. at 382 (Powell, J., dissenting).

The Fund Act and § 9012(f) preserve accountability in publicly financed presidential elections by placing a $1,000 ceiling on independent expenditures by non-party political committees. NCPAC Chairman John T. Dolan, recently noted the lack of accountability inherent in "independent expenditures,":

> I am against independent expenditures. I do not think they help the political process. . . They [independent expenditures] decrease accountability because we [NCPAC] could sit there and say that George McGovern . . . is cheating on his wife. Jim Abdnor can say "isn't that a terrible thing to say" and go right on and reap the benefits if that helps him. I think that candidates should be accountable for charges that are brought. . . .

Presentation of John T. Dolan, *FECA: After a Decade of Political Reform, A National Conference by Citizen's Research Foundation* (April 3, 1981). This problem of accountability is a uniquely sensitive one in the context

of a publicly financed presidential election with its attendant expenditure limitation.[57] As noted *supra*, one of the major purposes of the Fund Act was "to facilitate communication by candidates with the electorate." *Buckley*, 424 U.S. at 91. Such communication is not furthered when a candidate must carefully husband his or her resources to respond to the attacks of non-accountable political action committees. And such a result in the absence of § 9012(f) clearly contravenes the underlying purposes of the Fund Act, purposes this Court found "significantly important." *Buckley*, 424 U.S. at 95. The district court's ruling on § 9012(f) which failed to recognize the principles established by this Court in *Republican National Committee*, *supra*, *Buckley*, *supra* and *Bellotti*, *supra* and even to consider compelling governmental interests presented in *Storer* v. *Brown*, *supra*, should be reversed.

IV. 26 U.S.C. § 9012(f) IS CONSISTENT WITH FIRST AMENDMENT FREEDOMS OF SPEECH AND ASSOCIATION.

Rather than operating as a serious infringement on individual first amendment freedoms, as found by the district court, the Fund Act, including § 9012(f), is the result of congressional effort not solely to remedy particular

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[57] The presidential expenditure limitation for candidates accepting public funds, now contained in 2 U.S.C. § 441a(b)(1)(B), was in Title IX of the Federal Election Campaign Act Amendments of 1974. The 1974 amendments included a number of overall expenditure limitations as well as those for public financing. The expenditure limitation formula for the presidential general election, 26 U.S.C. § 9004, (originally enacted in Pub. L. No. 92-178), was revised and codified into the section containing all of the overall expenditure limitations in Title 18. 18 U.S.C. § 608(c)(1)(B). The Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-284 which eliminated the overall expenditure limitations as a result of the decision in *Buckley* moved all of the Title 18 provisions into Title 2, making them all part of the Federal Election Campaign Act rather than the Criminal Code, Pub. L. No. 94-284, §§ 112, 201, thus placing the expenditure limitation for public financing in its present location.

evils prevalent in privately funded presidential campaigns but to construct a comprehensive plan which "furthers . . . pertinent First Amendment values." *Buckley*, 424 U.S. at 93.[58] Congress specifically structured the Fund Act and FECA to encourage citizen participation in presidential general election campaigns through the voluntary taxpayer check-off plan. Since its inception in 1973, citizens have designated nearly 250 million of their income tax dollars to the fund.[59] The high level of citizen participation has, in turn, enabled every major party candidate since 1974 to opt for a general election campaign fully funded by public monies.[60] Thus, to date the fund has clearly succeeded in achieving the objectives which the Court approved in *Buckley*, 424 U.S. at 91, 101. Public financing has proven itself to be a genuinely viable alternative to the rigors of fundraising which attend privately funded campaigns. *Buckley*, 424 U.S. at 91. The candidates need not focus their attention on the demands of contributors and potential contributors but are free to reach out to the populous at large and deliver their message. Thus, as intended by Congress, public monies have facilitated communication by candidates with the electorate by providing them with an alternative means for conveying to the voters persuasive reasons for electing them. *Id.* at 91, 100 n.136, 101.[61]

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[58] Indeed, the public financing system represents "a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion in the electoral process, goals vital to a self-governing people." *Buckley*, 424 U.S. at 92-93.

[59] According to the Internal Revenue Service, an average of 27% of all returns (including joint returns) processed between 1976 and 1979 indicated one or two dollar designations to the fund. "Presidential Fund-Income Tax Check-Off Status", Press Release Issued by Federal Election Commission, November 1980.

[60] No deficiencies in the fund have required that the candidates turn to private contributors." *See* 26 U.S.C. §§ 9003(b)(2), 9012(b).

[61] While the candidate may not accept private contributions to pay for "qualified campaign expenses," Congress has approved the Commission's interpretation of the term "qualified campaign ex-

Moreover, Congress, fully cognizant of the first amendment implications of the statute, offered numerous inducements for direct participation by voters in presidential campaigns by excluding certain activities from the definitions "contribution" and "expenditure" under FECA and the Fund Act while placing reasonable limits only on indirect forms of expression.[42] Thus, individuals are permitted to make unlimited independent expenditures to further the election of any presidential candidate. *See* 2 U.S.C. § 431(9) and (17); 26 U.S.C. § 9012(f).[43] *Republican National Committee*, 487 F. Supp. at 286, *aff'd mem.*, 445 U.S. 955 (1980). Individuals are free

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pense" to exclude, if the candidate so desires, legal and accounting services provided solely to ensure compliance with FECA and the Fund Act. *See* 11 C.F.R. § 9002.11(b)(5). Accordingly, individuals and organizations may, subject to FECA's contribution limitations, contribute to a separate fund established by the candidate to defray all legal and accounting compliance expenses. *See* 11 C.F.R. § 9003.3. This exemption for compliance expenses enables the candidates and their supporters to ensure that the candidates' allotment of public monies is put to the use for which it was intended: to facilitate the candidates' communication with the electorate. *Buckley*, 424 U.S. at 91.

[42] This Court has found that a statute, which restricts a desired activity for the purpose of achieving specific and legitimate legislative goals does not violate the first amendment merely because some individuals, with multiple avenues of expression available, wish to engage in the restricted activity. *See Virginia Pharmacy Board* v. *Virginia Consumer Council*, 425 U.S. 748, 771 (1976); *Grayned* v. *City of Rockford*, 408 U.S. 104, 116 (1972); *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968); *Kovacs* v. *Cooper*, 336 U.S. 77, 88-9 (1949).

[43] Nor does § 9012(f) apply to expenditures incurred by the media in reporting the news or taking editorial positions. 26 U.S.C. § 9012(f)(2)(A). Section 9012(f) further exempts expenditures incurred by a tax-exempt organization in communicating its views to its members 26 U.S.C. § 9012(f)(2)(B). Similarly, FECA extends this exemption to communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject. 2 U.S.C. § 441b(b)(2)(A). Section 9012(f) is narrowly drawn to apply only to expenditures by political committees in support of publicly funded presidential candidates.

to volunteer their services to any presidential candidate or political committee and to associate with and work for the candidate's political party. 2 U.S.C. § 431(8)(B)(i).[64] *See Buckley*, 424 U.S. at 22, 28, 48 n.54, *citing Civil Service Commission* v. *Letter Carriers*, 413 U.S. at 579; *Republican National Committee*, 487 F. Supp. at 286, *aff'd mem.*, 445 U.S. 955 (1980). In rendering such volunteer services to assist a publicly financed candidate, individuals may use their real or personal property, provide invitations, food and beverages up to $1,000, and may spend an additional $1,000 on personal travel. 2 U.S.C. §§ 431(8)(B)(ii), 431(8)(B)(iv). These inducements exemplify "Congress' valid interest in encouraging citizens participation in political campaigns." *Buckley*, 424 U.S. at 36.

Nor does any provision of FECA or the Fund Act, including § 9012(f), limit an individual's ability to give or spend money to promote issues or to help issue-oriented groups. *See United States* v. *National Committee for Impeachment*, 469 F.2d 1135, 1139-42 (2d Cir. 1972); and *American Civil Liberties Union* v. *Jennings*, 366 F. Supp. 1041, 1055-57 (D.D.C. 1973), *vacated as moot sub nom. Staats* v. *ACLU*, 422 U.S. 1030 (1975). *See also Buckley*, 424 U.S. at 79 n.106. Indeed, the entire statutory scheme, including § 9012(f), effectively makes the same distinction between expenditures made to support publicly financed presidential candidates and other political activity as do the Hatch Act restrictions upheld in *United Public Workers* v. *Mitchell*, 330 U.S.

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[64] Indeed, individuals may engage in a variety of activities in coordination with the candidate's campaign which do not require the expenditure of their own funds, including: (a) writing research papers; (b) stuffing envelopes; (c) handing out leaflets (d) carrying signs; (e) manning phone banks; (f) writing letters to the candidate expressing opinions on current topics; (g) compiling lists of friends and contacts; (h) encouraging others to volunteer their time to the campaigns; (i) drafting and presenting questions for the party platform; (j) serving as a surrogate speaker; (k) door-to-door canvassing; (l) participating in voter registration drives; (m) participating in get-out-the-vote drives organized by the campaign or the candidate's party.

at 99-100 (1947) and *Civil Service Commission* v. *Letter Carriers*, 413 U.S. at 556.

Additionally, in structuring FECA and the Fund Act, Congress additionally recognized the central role played by political parties in presidential general election campaigns. While Congress ultimately concluded that the goals of the public financing system would best be served by providing the monies directly to the candidates rather than to the political parties,[65] numerous provisions were carefully designed to ensure the active participation of political parties in advancing the election of their nominees. Thus, FECA provides that individuals may contribute up to $20,000 per year to the committees maintained by a national political party; and political committees may contribute up to $15,000 annually to a national party's committees. 2 U.S.C. §§ 441a(a)(1)(B), (2)(B). The party may then, in turn, make expenditures in support of the party's presidential candidate of up to two cents for each member of the voting age public—an amount of $4,637,653.76 in 1980. 2 U.S.C. § 441a(d)(2), formerly 18 U.S.C. § 608(f); *Buckley*, 424 U.S. at 59 n.67. Individuals may freely associate with and contribute to state and local party committees; those committees may, in turn, defray without limit the costs of such grassroots activities as voter registration and get-out-the-vote drives on behalf of the party's presidential candidates. 2 U.S.C. § 431(8)(B)(xii). Similarly, a state or local party committee may incur unlimited expenditures for campaign materials, such as pins, bumper stickers, handbills, brochures, posters, party tabloids, and yard signs, used by the committee in connection with volunteer activities on behalf of the party's presidential nominees. 2 U.S.C. § 431(8)(B)(x). The foregoing inducements to individual participation in political parties serve the legitimate interests recognized by this Court in *Buckley* of ensuring that public financing does not result in creating a system of splintered parties or encouraging unre-

[65] Under the Long Plan, the public funds would have been given directly to the political parties. *See* discussion, *supra* at 13-14.

strained factionalism. *Buckley*, 424 U.S. at 101. *See* discussion, *supra*, at 38-40.

The court below, however, ignored the positive impact of public financing on first amendment activity and rejected the distinction between individuals and political committees to which this Court has accorded constitutional significance. The district court stated that:

> the fact of receipt of contributions (to finance expenditures) does not distinguish political committees from any other association which takes an active position on a candidate. Likewise, a political committee is no different under the First Amendment from a wealthy individual who may . . . lawfully dedicate his entire fortune to make independent expenditures paying for the same public communications . . . which the committee would undertake.

FEC J.S. App. A at 24a.

But appellees are clearly not like a wealthy individual or like groups of individuals who retain control over the spending of their own funds to support candidates. Rather, AFC, AEP and FCM are paradigms of political committees a "major purpose of which is the nomination or election of a candidate" and which accordingly "fall within the core area sought to be addressed by Congress." *Buckley*, 424 U.S. at 79.[66] Appellee committees indicate

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[66] The statute does not limit a group of individuals making expenditures to amplify their voices in support of a publicly financed candidate so long as the individual participants retain control over their funds. As the Commission has noted in concluding that an individual was operating as a political committee:

> the operation described by the request does not involve the joint purchase by several individuals (each paying their respective shares of the purchase price directly to the vendor from personal funds) of printing or reproduction services to publish a brochure containing a message of election advocacy. Rather, what is described is the solicitation of funds from the general public which funds are used to influence the outcome of a Federal election pursuant to the decisions of [the Committee's leaders].

Advisory Opinion 1980-126, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5577, at 10,713. Under this rationale, a group of indi-

that they are ongoing entities and will operate not simply as groups of individuals making "independent" expenditures on behalf of a single candidate during the 1980 election cycle. FCM, for example, has been in existence since 1972. Moreover, contributors to appellee committees do not exercise any control over the committees' policy or management other than in a highly indirect manner by refusing to contribute.[67]

Contributors to appellee political committees receive no assurance that their contributions will even be used for expenditures on behalf of a presidential candidate. Appellees are multi-candidate political committees which make contributions to more than 5 federal candidates. *See* 2 U.S.C. § 441a(a)(4). Indeed, Commission records reveal that all of the political committees in question have made contributions to both House and Senate candidates.[68]

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viduals who retain "control" over their funds, rather than relinquishing control by making a contribution, would not be a political committee. *See also* AO 1980-106, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5582; AO 1979-41, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5427 (a committee whose purpose is to draft candidates is a "political committee"); AO 1976-51, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5215 (a group becomes a political committee when one of its purposes is to receive and make "contributions" to federal candidates). Indeed, AEP, one of appellants herein, initially sought guidance from the Commission requesting an opinion that § 9012(f) did not prohibit its operations; that opinion request was withdrawn on July 1, 1980, so that the Commission had no opportunity to rule on the interpretation and extent of § 9012(f). *See* AOR 1980-61, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 3564 at 3179, *withdrawn*, ¶ 51 at 160.

[67] The district court believed that "[t]he contributors do have power over the speech disseminated by the political committees. . . . If a committee disappoints its membership, contributions will dry up." FEC J.S. App. A at 18a. Commission records disclose that for the last quarter of the general election period ending November 24, 1980, over 90% of the contributions to AFC and AEP are from one-time contributors to those committees. Nevertheless these committees were able to amass and spend $1,982,064 to further the election of publicly funded candidates in 1980.

[68] For example, through December 31, 1980, AFC indicated in its reports that it made over $17,250 in contributions to 21 federal

Additionally, much of the money received by the three appellee political committees has been channeled into areas other than direct speech.[69] It is clear that an individual contributing to any of the three appellee political committee has no assurance that the money contributed will actually be used "to speak one's mind." [70] *Buckley,*

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candidates and that as of December 31, 1980, it had a cash-on-hand balance of $11,425.09 and outstanding debts totalling $46,552.77. Similarly, during the period ending December 31, 1980, AEP made $14,000 in contributions to 14 federal candidates, had a cash-on-hand balance of $46,065.19 with no outstanding debts. During the period ending November 24, 1980, FCM made approximately $146,306 in contributions to 83 federal candidates, had a cash-on-hand balance of $48,781 and outstanding debts of $183,394. FCM's contributions were made during 1979 and 1980.

[69] In fact, approximately 25-30% of all monies spent by these committees went for operating expenses. These expenses include legal and accounting fees, salaries, office and furniture rental, surveys and poll research, travel and lodging, and office supplies. The extent to which a contributor's money is spent for non-speech is best illustrated by the following data:

Multicandidate Political Committee	Total Disbursements	Operating Expenditures	% of Total Disbursement
FCM	3,046,454	730,735	23.98
AEP	1,874,312	579,267	30.90
AFC	1,061,123	324,412	30.57

See Data at 184, 222 and 224. The line 19 operating expenditures for FCM, AEP and AFC are found at these respective FEC microfilm locations: 80/03/182/2202; 80/03/176/2825; and 80/03/176/2645.

[70] Paul Wilson, an associate of Bailey and Deardourff, and media consultant to AEP, has observed:

> The vast majority [of independent expenditure committees] were really fronts for fundraising in order to increase the donor base of various groups. They would charge high overhead and mail out thousands of letters, millions in some cases, to increase their number of donors. The problem with that is that, you have very little of that money . . . going to the actual purpose for which it is raised.

Presentation by Paul Wilson, *FECA: After a Decade of Political Reform, A National Conference by Citizen's Research Foundation* (April 3, 1981).

424 U.S. at 48, *citing New York Times* v. *Sullivan*, 376 U.S. at 269.

Clearly, the district court erred when it concluded that AFC, AEP and FCM are "simply 'pooling agents' for many small voices [71] wishing to make intelligible political statements" and that "[t]he money expended by the committees pays for political communications which speak the language of their members [72] and contributors." FEC J.S. App. A at 17a. The district panel did not and could not identify any factual example of the agent-principal relationship between appellee political committees and their contributors, the relationship which stood as the sole basis for the panel's decision to abrogate Congress's judg-

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[71] During the last quarter of the 1980 election year cycle, FEC records indicate that the "small voices" to which the court referred made an average itemized contribution of $1,120 to AEP, $700 to FCM and $750 to AFC. By comparison, "in the 1976 primary campaign, Reagan raised an average of $48.75 from 185,000 contributors." *Republican National Committee*, 487 F. Supp. at 299, *aff'd mem.*, 445 U.S. 955 (1980).

[72] The district court was apparently of the opinion that appellees are membership organizations, a conclusion which finds no basis in law or fact. Only AEP even so much as claims that its contributors are "members." It is clear, however, that none of appellee committees, including AEP, exhibit the indicia of membership organizations set forth by this Court in *Hunt* v. *Washington Apple Advertising Commission*, 432 U.S. 333, 344-345 (1977). Unlike the members of the organizations in *Hunt*, contributors to appellee committees do not participate in selecting the officers or directors of the committees. There is no indication whatsoever that the officers or directors of appellees must even contribute to the committee. Nor are the costs of appellees' activities financed by levying assessments upon the contributors. Indeed, the district court acknowledged that the only means by which contributors could exercise control over the activities of appellee committees was by refusing to contribute. The contention that the contributors' power to withhold contributions demonstrates sufficient control over the organization to elevate them to the status of "members" has, however, been rejected. *See Federal Election Commission* v. *National Right to Work Committee*, 501 F. Supp. 422 (D.D.C. 1980), *appeal docketed*, Nos. 80-1487, 80-1488 (D.C. Cir. May 7, 1980); *Health Research Group* v. *Kennedy*, 82 F.R.D. 21 (D.D.C. 1979).

ment.[73] Rather than serving as mere "pooling agents" for thousands of "small voices," the relationship between appellee political committees and their contributors has been more accurately perceived by members of Congress:

> In essence these people are asked to pour money into the wide mouth of a funnel without any real idea of where the spout came out. The only thing they know is that "it will help the cause."

120 Cong. Rec. 27,244 (1974) (remarks of Rep. Brown). And as the United States Court of Appeals for the Ninth Circuit (en banc) recently observed, "political action committees have become vast, unaccountable, and low visibility centers of electoral influence . . . natural targets for candidate influence." *California Medical Association* v. *Federal Election Commission, supra* at 50,990, 50,991.

Moreover, this Court has already recognized the attenuated relationship between contributions to political committees and the contributors' interests in speech and association. In *Buckley, supra*, this Court recognized that a contribution is entitled to less protection under the first amendment being a symbolic expression of support:

> While contributions may result in political expression if spent by a candidate *or an association* to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.

424 U.S. at 21. (emphasis added). Nevertheless, the district court concluded that "speech promulgated through a political committee bears a different relation to its constituent contributors than does a candidate's speech to his or

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[73] A review of appellee committee's itemized disbursements seriously draws into question the district court's conclusion that "the money expended by the committees pays for political communications which speak the language of their members and contributors." FEC J.S. App. A at 17a. For example, on December 15, 1980, approximately 6 weeks after the November 4 election, AFC expended $6,675 for the "purchase of tickets" from the John F. Kennedy Center for the Performing Arts and $2,000 for the "purchase of Inaugural tickets" from the Reagan Inaugural Committee. FEC Microfilm Location 80/03/176/2656.

her constituent supporters (or, contributors to the non-publicly funded candidate)." FEC J.S. App. A at 19a. This conclusion is plainly erroneous as a matter of law in light of the constitutional distinction drawn between contributions and expenditures in *Buckley, supra.* Contributions are merely a symbolic, indirect form of speech; thus, § 9012(f) limits the speech of the individual contributors only to the extent that it limits the manner in which a political committee may spend the funds contributed.

If appellees were the mere "pooling agents" that the district court envisioned them as being, then they would not, as a matter of law, be multi-candidate political committees. Clearly appellees are the paradigm of political committees which Congress recognized would subvert the goals of public financing if permitted to incur large expenditures to further the election of publicly funded candidates. Surely Congress is entitled to conclude that expenditures such as those incurred by appellees would reduce the candidates' public allotment to little more than a subsidy and pose a substantial risk of creating "political debts." *See Bellotti,* 435 U.S. at 787 n.26. Thus, § 9012(f) is part and parcel of the public financing scheme. It furthers the goals which Congress sought to achieve in devising the Fund Act and serves first amendment values.

V. SECTION 9012(f) SERVES SUFFICIENTLY COMPELLING GOVERNMENTAL INTERESTS TO SUSTAIN EVEN A SIGNIFICANT INTERFERENCE WITH FIRST AMENDMENT RIGHTS.

Even if viewed as a substantial restriction on first amendment interests, § 9012(f) must still be sustained based on this Court's prior holdings that the asserted governmental interests underlying the Fund Act and its integral provisions are compelling. *Buckley,* 424 U.S. at 95; *Republican National Committee, supra, see* section III, *supra.* The legislative history and subsequent events supporting the congressional judgment demonstrate that § 9012(f) is essential to achieving those purposes of

public funding approved by this Court as significant and compelling. *See* sections I and II, *supra*. Section 9012(f) is narrowly drawn, applicable only to political committees making independent expenditures in support of publicly funded presidential candidates, and is necessary to protect the integrity of the congressional program. *See* section IV, *supra*. Section 9012(f) must therefore be upheld.

CONCLUSION

For reasons set forth herein, this Court should reverse the judgment of the United States District Court for the District of Columbia and hold 26 U.S.C. § 9012(f) consistent with the first amendment to the Constitution of the United States.

Respectfully submitted,

CHARLES N. STEELE *
General Counsel

KATHLEEN IMIG PERKINS
Assistant General Counsel

JEFFREY H. BOWMAN
MIRIAM AGUIAR
SONDRA L. MILLS
Attorneys

Attorneys for
FEDERAL ELECTION COMMISSION
1325 K Street, N.W.
Washington, D.C. 20463
(202) 523-4143

* Counsel of Record

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